

STATE OF MICHIGAN
COURT OF APPEALS

SHELDON SHACKET and SHEL
DEVELOPMENT COMPANY, INC.,

UNPUBLISHED
April 27, 2001

Plaintiffs-Appellants,

v

GERALDINE SHACKET and THE GERALDINE
SHACKET TRUST,

No. 218791
Oakland Circuit Court
LC No. 96-527143-CH

Defendants-Appellees.

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent and would find that the trial court clearly erred in finding that plaintiff's trial counsel had apparent authority to agree to the settlement agreement.

Plaintiff Sheldon Shacket entered into a written contract with defendant Geraldine Shacket, his mother, on November 4, 1993, stating that plaintiff would be entitled to own, free and clear of any encumbrances, certain real property in exchange for plaintiff signing over his interest in his father's land development company (which had assets in excess of one million dollars). Defendant, however, sold the house and plaintiff filed an action for breach of contract on July 24, 1996. The case was submitted to binding arbitration and the arbitrator awarded judgment in favor of plaintiff in the amount of \$333,738.87. Pursuant to the arbitrator's award, the trial court entered judgment and assessed costs, fees, and interest against defendant for a total judgment of \$419,373.87.

After being informed by defense counsel that the arbitrator's award would be challenged, plaintiff's then-counsel, Robert Hamburger, began negotiating a settlement with defense counsel. Ultimately, a settlement agreement was reached, in which the arbitration award and taxed bill of costs were set aside, all related claims were released, and defendant would make periodic payments to a certified public accountant who would make disbursements for plaintiff's "necessities," which were defined in the settlement agreement. Further, because of plaintiff's drug addiction, in order to receive payment, plaintiff was required to remain drug free and submit to urinalysis tests as verification. The settlement agreement further provided several conditions that would allow defendant to terminate payments to plaintiff before satisfaction of the judgment.

On February 8, 1999, a hearing was held before the trial court regarding entry of the settlement agreement. Plaintiff was not present at this hearing because he was incarcerated in the State of California. Defendant appeared with her counsel and her son Robert Shacket, and Robert Hamburger appeared on plaintiff's behalf. Hamburger told the trial court that he had been in touch with plaintiff and that plaintiff had given him "the authority to exercise reasonable judgment to approve the settlement along the lines that I already outlined to him and the details of which [defense counsel] has reduced to an outline form and put on the record today." The trial court, relying on this representation by plaintiff's counsel, indicated that it would confirm the settlement and requested that a written settlement agreement be submitted within two weeks of the hearing.

In the meantime, in February 1999, plaintiff hired another attorney, Robert Vandenbroucke, to represent him and challenge the settlement agreement. On March 5, 1999, Vandenbroucke filed objections to the entry of the stipulated judgment on plaintiff's behalf. At the hearing held on March 17, 1999, Vandenbroucke presented letters from Hamburger to plaintiff evidencing misrepresentations and duress to settle on behalf of plaintiff. Vandenbroucke contended that the letters showed that Hamburger lacked any authority to agree to the settlement agreement. In this regard, Hamburger's letters indicated to plaintiff: (1) that absent a settlement, defendant would probably succeed in having the entire case dismissed; (2) that plaintiff did not have sufficient funds to pay for an appeal; (3) that plaintiff would not have to pay attorney fees, however, the entire settlement amount—including attorney fees—was to be paid from a trust fund representing plaintiff's future inheritance, and thus, any payment plaintiff received would be deducted from his future inheritance; and (4) that Hamburger had been unable to communicate with plaintiff during the settlement negotiations.

The trial court, relying on *Nelson v Consumers Power Co*, 198 Mich App 82; 497 NW2d 205 (1993), ruled that Hamburger had apparent authority to agree to the settlement agreement. In *Nelson, id.*, p 90, this Court relied on *Capital Dredge & Dock Corp v Detroit*, 800 F2d 525 (CA 6, 1986), and held that a third party who reaches a settlement agreement with an attorney employed to represent the client regarding the settlement is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. Initially, I note that the holding in *Nelson* is highly dubious since it appears to conflict with Supreme Court precedent. In *Henderson v Great Atlantic & Pacific Tea Co*, 374 Mich 142, 147; 132 NW2d 75 (1965), our Supreme Court held:

The almost unanimous rule, laid down by the courts of the United States, both Federal and State, is that an attorney at law has no power, by virtue of his general retainer, to compromise his client's cause of action; but that precedent special authority or subsequent ratification is necessary to make such a compromise valid and binding on the client. [Quoting 66 ALR 107 *et seq.*, as supplemented in 30 ALR 2d 944 *et seq.*]

In any event, *Nelson* is factually distinguishable since the majority noted that the attorney was "acting solely in the interest of a client and without any improper motives," and, therefore, had the apparent authority to settle the lawsuit on behalf of the client. *Id.*, p 83. In the present case, the evidence, specifically the letters, indicate that plaintiff had not given Hamburger any

authority to approve the settlement and Hamburger appears to have been improperly motivated by receiving an unconscionable attorney fee of \$106,982 that was awarded out of plaintiff's inheritance from his father's trust. Moreover, the letters evidence misrepresentations made by Hamburger¹ and are clearly coercive. In addition, defendant, who is not only the trustee of the trust but also plaintiff's mother, held an unconscionable advantage over plaintiff as shown by the terms of the settlement agreement. For example, defendant is to receive an assignment of plaintiff's interest in the trust so that the structured payments under the settlement agreement would be offset against plaintiff's future inheritance regardless of any nonassignability or spendthrift provisions set forth in the trust.

Under these circumstances, I would find that Hamburger had no authority to enter into the settlement agreement because there is evidence of fraud or unconscionable advantage. *Groulx v Carlson*, 176 Mich App 484; 440 NW2d 644 (1989). I would reverse the trial court and order that the stipulated judgment be set aside.

/s/ Kathleen Jansen

¹ At least one glaring misrepresentation in the February 23, 1999, letter is that plaintiff "would not be paying [Hamburger's] fees under the settlement." This is totally contrary to the terms of the settlement agreement.